

**NOT
MEASUREMENT
SENSITIVE**

**DOE G 430.1-X
XX-XX-07**

Alternative Financing Guide

[This Guide describes suggested nonmandatory approaches for meeting requirements. Guides are not requirements documents and are not to be construed as requirements in any audit or appraisal for compliance with the parent Policy, Order, Notice, or Manual.]



U.S. Department of Energy
Washington, D.C. 20585

1. PURPOSE

This Guide addresses situations in which a DOE contractor or other third party submits a proposal to use alternative financing to acquire the use of an asset—in most cases, office or laboratory space—for DOE mission needs. Such contractor proposals should be considered after consulting with the Office of Management and Budget (OMB) to determine if—

- there is a legitimate need for the asset,
- costs of obtaining it through an alternative financing arrangement are reasonable, and
- acceptance of the proposal can be shown to be a sound business decision in the best interests of the Department and the taxpayer.

2. SCOPE

This Guide applies to proposals valued \$5 million or more and affects Departmental elements with responsibility for real property assets.

3. ALTERNATIVE FINANCING GUIDE

Alternative financing proposals should be based on—

- OMB Circular A-94, *Guidelines and Discount Rates For Benefit-Cost Analysis of Federal Programs* and
- OMB Circular A-11, Appendix B, “Budgetary Treatment of Lease-Purchases and Leases of Capital Assets,” available at:
http://www.whitehouse.gov/omb/circulars/a11/current_year/app_b.pdf.

Operating lease scoring criteria generally limit the Government’s approval of alternatively financed projects to periods less than the estimated economic life of the asset. OMB Circular A-11 outlines the process for determining the present value of the minimum lease payments over the life (net present value) of the lease, and how not to exceed 90 percent of the private sector cost of the fair market value (total project development cost) of the asset at the beginning of the lease term. Also, the lease term should be less than 75 percent of the estimated economic life of the asset (see OMB Circular A-11, Appendix B).

Alternative financing arrangements may be complex, and each supporting business case will be unique. The review process allows flexibility in evaluating a wide variety of proposals, while ensuring the consistency of the analysis needed to approve a business case proposal. The checklist shown in Attachment 1 supports the review process which is shown in the flowchart in Attachment 2.

4. ALTERNATIVE FINANCING PROCESS

- The process for evaluating an alternative financing proposal would be conducted in four phases as follows.
- a. **Phase 1: Receipt of initial contractor proposal, review and development of contractor's preliminary statement of mission need and preliminary business case as defined in OMB Circulars A-94 and A-11)**

A contractor proposal should include an assessment of the project's need, risks, and merits; general terms and conditions; potential schedule and costs; a vision for the project; and a verified range of market costs for leasing a comparable asset. Specific elements that should be included are detailed in Phase 2.

The process begins with the requirements outlined in DOE O 430.1B, *Real Property Asset Management*, dated 9-24-03. The management and proposed acquisition of capital assets of real property should take a corporate, holistic, performance-based approach that links real property asset planning, programming, budgeting, and evaluation to program mission projections and performance outcomes.

Acquisitions, sustainment, recapitalization, and disposal should be balanced to create an atmosphere where real property assets are available, utilized and are in a suitable condition to be applied to DOE missions.

Major real property asset acquisition and management should include the functional components of planning, real estate, acquisition, maintenance and recapitalization, disposition and long-term stewardship (LTS), value engineering (VE), and performance goals and measures.

The plan for acquiring assets through alternative financing will be most successful if it defines the basis for the need and the method for determining square footage and physical and structural requirements. The analysis should show that either the acquisition will replace existing facilities or it is required to augment increased mission responsibilities.

Once the need is demonstrated and approved, the contractor should be asked to further develop the proposal to address mission need in accordance with the criteria provided in OMB Circulars A-11 and A-94.

To be considered, the business case should demonstrate that the proposal—

- makes sound economic business sense
- is reasonable by market standards for similar facilities; and

- can be scored as an operating lease under the criteria established in OMB Circular A-11.

The business case analysis should define the potential economic advantage of approving the contractor's alternative financing proposal as the best value to the Government based on not only in terms of the cost of the proposed facilities but also full consideration of approved program needs, resulting in lowest cost. OMB Circular-94 contains appropriate guidance.

Alternative financing transactions should be structured around an operating lease based on Circular A-11 criteria for OMB analysis and whether it will be classified as an operating or capital lease.

One acceptable method to structure a transaction is the use of a limited-term lease with a termination clause of one year or less that provides flexibility regarding the need for the asset in the future.

Per OMB A-11, for operating leases, budget authority is required for the estimated total payments expected under the full term of the lease, or if the lease includes a cancellation clause, an amount sufficient to cover lease payments for the first and last years plus an additional amount sufficient to cover costs associated with canceling the lease. OMB scores those without termination clauses as capital leases.

Additional factors used in distinguishing between operating and capital leases, and in calculating term of the lease and minimum lease payments are:

- If the project is constructed or located on Government land, it will be presumed to be for the special purpose of the Government. However, OMB has advised that this presumption may be overcome. OMB will review such proposals on a case-by-case basis.
- It will be presumed that the lease will run for the full term of the contract, and the minimum lease payments will be calculated on the basis of the lease payments that will be made over the full term of the lease (including options to renew). Therefore, the lease must have a 365 day or less termination clause to be exercised at the sole option of the Government; otherwise, the entire term of the lease will be scored in the first year.

A proposal with sufficient detail might facilitate the review of OMB Circular A-11 scoring requirements and comparison with other options listed in OMB Circular A-94.

The contractor should not ask the marketplace for firm offers and should avoid statements or commitments that could place emphasis on timing of the Department's evaluation of the proposal.

The contractor should, however, provide an accurate estimate of the range of costs and terms that might be expected. To determine if the proposal is viable, the parameters of the project should provide analyses defined in OMB Circulars A-11 and A-94.

To be considered reasonable, OMB requires that the proposed rental rate be at or below market prices when adjusted appropriately to reflect level of service and operational support being provided. (For definition of best value refer to Attachment 3.)

DOE contractors making alternative financing proposals may recover some allowable costs of preparing their proposals.

Costs that are properly expenses of the third party are not reimbursable.

Reimbursable costs may include:

- developing the mission need;
- exploring and assessing options to fulfill the mission need;
- preparation, review, and revision of the business case, only to the extent necessary for review under OMB Circular A-11 and the Davis-Bacon Act (40 U.S.C. § 276a); and
- drafting and negotiating documents, such as deeds and leases, but only if the contractor will be a signatory and legally bound by the document.

Contractors that have direct financial interest, such as ownership of the land on which the project will be built are not eligible to recover any costs expended on the project.

Reimbursable costs do not include costs for

- developing and issuing a request for proposals
- selecting a developer; and
- working with a bond issuer, or other form of financing source.

b. Phase 2: Confirmation of consistency with mission need; review of OMB Circulars A-11 and A-94 and Davis-Bacon Act requirements; PSO approval; Office of Administration (MA)/Office of Engineering and Construction Management (OECM), Chief Financial Officer and General Counsel, and OMB review.

DOE staff reviews contractor proposals, establishes the need for the facility, and determines that cost estimates and schedules are reasonable and accurate.

(1) Program/Site Office Team

If the program/site office in receipt of the initial proposal determines that the asset fulfills an approved mission need or a need otherwise identified based on the site's overall real property asset management (RPAM) plan, the program/site office forms a team to manage the analysis and process requirements.

If the RPAM plan does not reference the need, the team should determine whether the RPAM should be revised.

Contractors or consultants with no financial interest in the outcome of the alternative financing proposal may be involved in the review of the proposal, but not in deciding the outcome of the proposal.

The team should analyze the merits of the proposal and its potential to comply with OMB Circular A-11 operating lease requirements that—

- ownership remains with the lease holder,
- the lease does not contain a bargain-price purchase option,
- present value of minimum payments over the life of the lease does not exceed 90 percent of fair market value (based on the private-sector total estimated cost of project development),
- it is a general purpose asset,
- a private-sector market exists for the asset, and
- the lease term does not exceed 75 percent of estimated economic life of the asset.

Consideration should also be given to the level of risk assumed by the Government, defined in terms of how governmental in nature the project is. Less governmental in nature projects generate higher private sector risk. The criteria used by OMB for assessing risk, are:

- No provision of Government financing and no explicit Government guarantee of third-party financing
- Risks incident to ownership of the asset (e.g. financial responsibility for destruction or loss of the asset) remain with the lessor unless the Government was at fault for such losses

- The asset is a general purpose asset rather than being for a special purpose of the Government and is not built to the unique specification of the Government as lessee
- There is a private-sector market for the asset
- The project is not constructed on Government land

If analysis indicates that a proposal has sufficient merit and could meet OMB Circular A-11 requirements as an operating lease, the team should analyze the full range of options available for meeting mission needs.

OMB Circular A-94 defines life-cycle analysis that considers the following possible conclusions:

- doing nothing (maintaining the status quo),
- up-grade, renovate, share or convert existing Government property;
- purchase (line item acquisition), or
- lease or contract for services (operating lease/alternative financing).

As with the analysis of any alternative financing proposal, the team would typically consider and analyze the full-life cycle requirements of the mission need and verify that the alternative financing proposal is a way of fulfilling that need which offers the best value to the Government. To effectively evaluate each potential alternative, it is important that the team have a complete understanding of the performance parameters required to meet the mission need.

The site Labor Standards Committee should give due consideration to whether the project would be covered by provisions of the Davis-Bacon Act (40 U.S.C. §276a)¹ as part of the business case proposal

Evidence of DOE responsibility for initiating the specific proposal may strongly indicate that it should be covered by the Davis-Bacon Act (DBA).

¹ The Davis-Bacon Act (40 U.S.C. §276a) requires payment of prevailing wage rates for construction, alteration, and repair of a public building or work. The length of the underlying lease is included among the five factors used to determine when the DBA applies to lease arrangements involving more than incidental construction:

“the length of the lease, the extent of government involvement in the construction project, the extent to which the construction will be used for private rather than public purposes, the extent to which the costs of construction will be fully paid for by the lease payments, and whether the contract is written as a lease solely to evade the requirements of the Davis-Bacon Act.”

Reconsideration of Applicability of the Davis-Bacon Act to the Veteran’s Administration’s Lease of Medical Facilities, 18 U.S. Op. Off. Legal Counsel 109 (May 23, 1994), slip op. at 11, n. 10 (emphasis added).

If appropriate, the team should recommend to the site manager that the contractor be authorized to proceed with the business case proposal and provide sufficient detail and specificity to clearly indicate whether costs are reasonable and whether alternative financing should be approved.

If the team concludes that it is in the Department's best interest to accept the alternative financing business case proposal, it should submit a formal recommendation that the site manager forward the proposal to the program Secretarial Officer (PSO) for consideration.

The recommendation should be sufficiently detailed to present and support the business case and allow an independent reviewer to follow the process without having to make assumptions. Any documents, including drafts of deeds, leases and other pertinent legal instruments, and Congressional notifications (if appropriate), should also accompany the submission.

(2) Headquarters Review

When the site office and the PSO have both determined that the proposal is consistent with mission need, reflects the best value to the Government, and meets the requirements of OMB Circulars A-11 and A-94, the program office, as champion of the proposal, provides copies of the complete proposal to the following:

Office of General Counsel (OGC) (2 copies) and an additional copy for NNSA GC, when applicable)

Office of the Chief Financial Officer (3 copies)

Office of Engineering and Construction Management,
Office of Administration (1 copy)

The program office should convene a meeting, of Federal employees representing the appropriate review offices—usually no earlier than two weeks after the proposal was distributed—where the program office and the site office present the proposal.

The review offices should have completed initial review and be able to identify office points of contact, request additional documents, discuss timeframes for reviews, and discuss the strengths and weaknesses of the proposal.

Any follow up materials or revisions to the proposal resulting from this informal meeting and agreed to by the participating parties should be provided to each of the review offices. It is recommended that this be done concurrently.

When issues identified during the initial review have been addressed and it has been determined that the proposal makes good business sense, the PSO should submit the proposal to MA/OECM with a memorandum indicating support.

MA/OECM should use an external independent to analyze the merits of the business case.

External independent reviews are funded by program offices and the PSO should have funding in place with MA/OECM for the external review.

In the event the subsequent analyses differ from the original submission the PSO should conduct follow up meeting with the staff offices and document the results.

The MA/OECM and external reviews should be completed within 45 to 60 days after receipt of the business case proposal. Recommendations from the MA/OECM will be forwarded to the PSO by memorandum with copies to the CFO, GC (and NNSA GC, when applicable).

CFO and DOE GC (or NNSA GC, when applicable) review will follow with recommendations submitted to the PSO.

Following review, rejected proposals will be documented and returned to the PSO with a written explanation.

PSO possible response to a rejected proposal may include

- further revision and negotiation of the business case proposal
- termination of the proposal.

When NNSA proposals are rejected, the Deputy Secretary should be consulted.

If the project is recommended for approval by MA/OECM, DOE GC (or NNSA GC, after coordination with DOE GC), and the CFO, the CFO, as the Department conduit, submits the proposal to OMB for review of the scoring impact, including copies of the external independent review, the OECM recommendation and all pertinent legal documents.

If the project involves a land transfer by DOE under section 161g of the Atomic Energy Act of 1954, or involves a transfer of land by sale or lease at a defense nuclear facility, the supplemental Congressional notification package should also be simultaneously submitted to OMB.

c. Phase 3: Under Secretary approval; development of the formal alternative financing offer and review for substantial changes

If OMB determines that the business case proposal scores as an operating lease, the alternative financing proposal is presented to the appropriate authority for approval. If approved, notification is to be transmitted through the PSO to the site manager, who authorizes the team to notify the contractor to validate and submit a formal offer.

The formal offer should be a firm commitment that the project will be completed at the cost and within the terms and conditions referenced in the approved alternative financing proposal. The site manager approves the final offer and should maintain records for audit.

The site manager is advised to document that the contractor's final formal proposal is within the terms and conditions previously reviewed by OMB.

Should the terms and conditions of the formal offer substantially change the scope of the proposal or affect the scoring, the PSO should resubmit a modified proposal.

After OMB review, the Department may again approve the revised proposal.

d. Phase 4: Secretarial notification to Congress, if required

Congress requires notification when a business case proposal includes a transfer of land under section 161g. of the Atomic Energy Act of 1954 and/or involves a transfer of land by sale or lease at a defense nuclear facility, and a separate Congressional notification package should be included with the original business case proposal submission with MA, CFO, DOE/NNSA GC and OMB concurrence. The Congressional notification should be submitted to OMB concurrent with the alternative financing package by the CFO.

Proposals involving land transfers cannot be formally approved by the Department until the congressional appropriations committees have been notified and 60 days has passed or the committees send a letter terminating their review, whichever is earlier.

Proposals involving transfers of land by sale or lease at a defense nuclear facility cannot be formally accepted until the congressional defense committees have been notified and a period of 30 days has elapsed.

For proposals involving a DOE transfer of land by sale or lease at a defense nuclear facility, the Department may offer indemnification, under 50 U.S.C. § 2811 and 10 CFR 770 for injury that results from the release or threatened release of a hazardous substance or pollutant or contaminant as a result of DOE activities.

Indemnification of such liabilities can be approved only by DOE officials who are Senate-confirmed Presidential appointees having specific delegated authority.

Indemnification must likewise receive concurrence of DOE GC, or, in the case of NNSA, NNSA GC concurrence with DOE GC coordination.

As the Department's alternative financing process continues to evolve, MA/OECM will maintain an inventory of tools, documents, regulations, examples and lessons learned on its website, <http://oecm.energy.gov>. This is a valuable resource for alternative methods to support the Department's commitment to providing high quality work and research environments.

ALTERNATIVE FINANCING PROCESS CHECK LIST

1. Receipt of initial contractor proposal; review and development of contractor's preliminary statement of mission need and preliminary business case (OMB Circulars A-94 and-11)

Date _____

 - A. A-94 requirements included

Yes _____
 - B. A-11 requirements included

Yes _____
2. Confirmation of consistency with mission need ; review of OMB Circulars A-11 and A-94 and Davis Bacon Act requirements; PSO approval; MA / OECM, CFO and GC review; and Submission to OMB
 - a. Mission need determined

Date _____
 - b. Determine if Department should consider alternative financing

Date _____
 - c. The alternatives development & review process (per OMB Circular A-94)

Date _____

 - (1) Team established to develop the Alternative Financing Strategy

Date _____

 - (a) Reviews Mission Need Statement
 - (b) Ensures proposal identifies all project interfaces
 - (c) Review proposal project's technical scope, schedule and costs
 - (d) Identifies risks associated with the proposed project, reviews full range of available alternatives including contractor proposal
 - (2) PSO receives Site Alternative Financing Proposal / Business Case

Date _____

 - (a) All required proposed leases and service agreements are attached

Yes ____ No ____
 - (b) Deed/other documents for land transfer are attached, if applicable

Yes ____ No ____
 - (c) Request for Environmental indemnification attached, if applicable

Yes ____ No ____
 - (3) PSO reviews and approves action

Date _____

 - (a) Funding is forwarded to OECM for External Review

Date _____
 - (b) OECM acknowledges receipt of funding

Date _____
 - (4) Proposal sent to OECM/OGC/CFO for initial review

Date _____

 - (a) Initial review completed by OECM/OGC/CFO

Date _____
 - (b) PSO convenes meeting to discuss results of high level review

Date _____

 - 1 Each review office will name points-of-contact

Date _____
 - 2 PSO will provide subsequent data, if required

Yes ____ No ____
 - (5) Alternative financing strategy/business case sent to OECM for review

Date _____

 - (a) External independent review

Date _____
 - (b) 2 copies sent to OGC concurrently

Date _____
 - (c) 3 copies sent to CFO concurrently

Date _____
 - (6) MA/OECM Recommendation to PSO

Date _____
 - (7) GC Review (DOE or NNSA)

Date _____
 - (8) CFO Review

Date _____
 - (9) OMB notification by CFO in coordination with PSO

Date _____
 - (10) OMB reviewed package returned to PSO

Date _____
3. Under Secretary approves action

Date _____

 - a. PSO forwards approval to Site Manager

Date _____
 - b. Site Manager authorizes Contractor to develop formal firm proposal

Date _____
 - c. Site Manger confirmation that formal proposal is in compliance with OMB review and Under Secretary's approved terms and conditions.

Date _____
 - d. Notification to MA/OECM only if final proposal is changed

Date _____
4. Secretarial Notification to Congress, if required

Date _____

 - a. OMB notification by PSO in coordination with MA/CFO/GC
 - b. PSO Obtains Internal HQ Concurrences

Date _____

 - (1) Office of Management

Date _____
 - (2) Chief Financial Officer

Date _____
 - (3) General Counsel

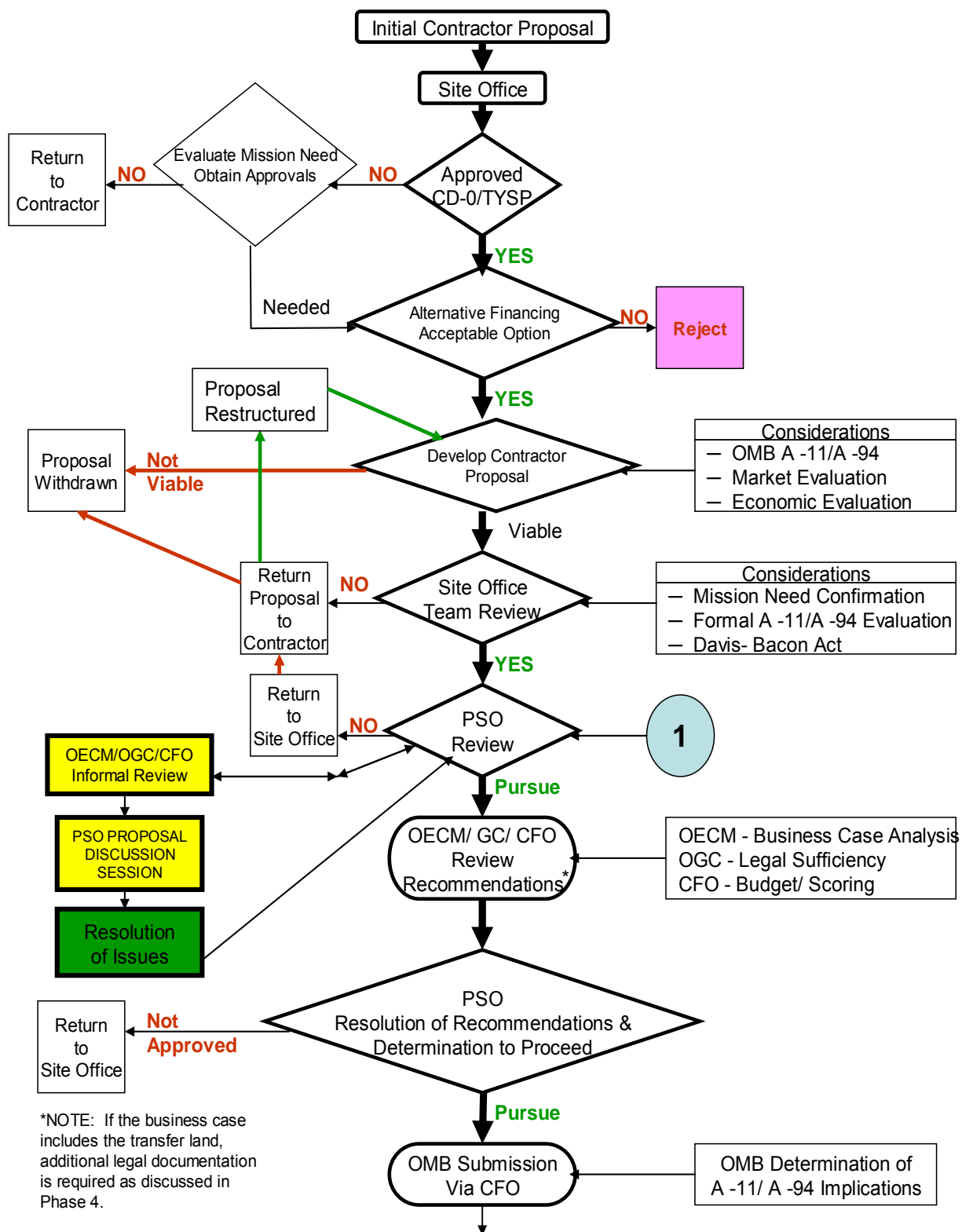
Date _____
 - (4) Congressional Affairs

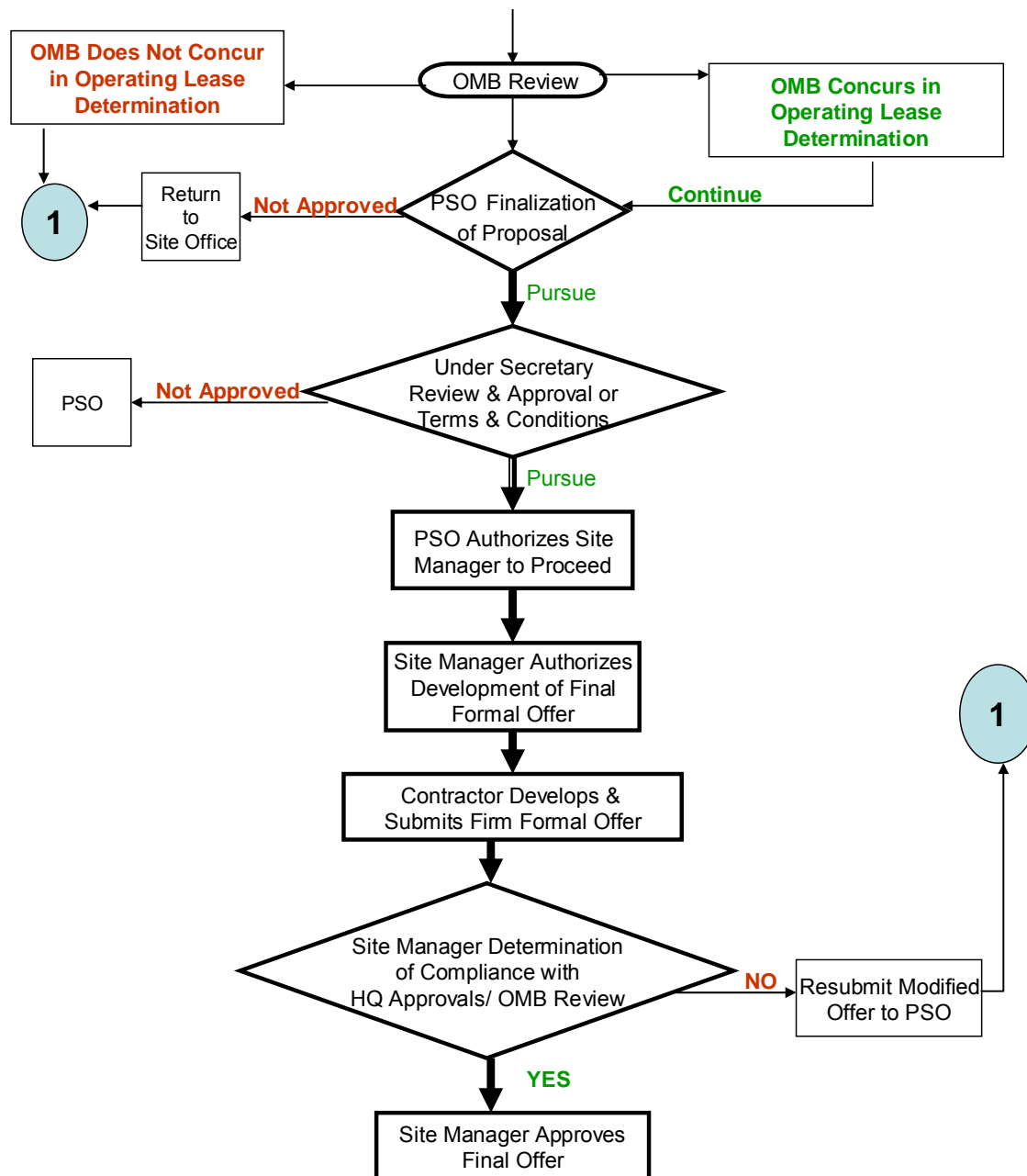
Date _____
 - c. Notification to senate armed services committee

Date _____

ALTERNATIVE FINANCING FLOW CHARTS

Alternative Financing Flow Chart





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FOOTNOTE:

This figure denotes the requirement to return the original business case proposal back to the originating office, which will make the determination to either advise the contractor to restructure its proposal, or it will decline to pursue the proposal further. If the PSO determines to proceed, the proposal will be re-evaluated and go through the same administrative review as if it were a new proposal. In the case that OMB declines to concur in the determination that the proposal reflects an operating lease, the PSO may elect to pursue the following options: 1) terminate project consideration, 2) seek line-item budget authority, and 3) re-submit to OMB IF such an opportunity exists after initial OMB review.

TERMS AND DEFINITIONS

All references to OMB circulars reflect information contained in current approved versions. OMB Circular A-11, Appendix B: Budgetary Treatment of Lease Payments and Leases of Capital Assets was changed effective June 30, 2006. OMB Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analyses of Federal Programs is revised annually for the changed in appropriate discount rates. The guidelines were last amended on October 29, 1992.

Best value—Finding from a systematic quantitative comparison of the costs (including economic benefit/cost analysis in accordance with OMB A-94) of alternative means of achieving the same stream of benefits or a given objective.

Capital lease—One that does not meet the criteria of an operating lease. Refer to Section 3, Page 6 of Appendix B; does not include lease purchase.

Differential cost of financing—Any interest rate above treasury's interest rate.

Economic life—The estimated time that a building will be in use at the completion of construction, usually a period of years stated in the proposal, assuming all required maintenance and capital upgrades are completed. Does not include cases of mortality from excessive economic change, poor business management, or natural disaster. It presumes normal wear and tear.

OMB authority—Budget Enforcement Act of 1990 and the Balanced Budget Act of 1997

Operating lease— Per A-11, an operating lease means a lease that meets all the criteria contained below. If the criteria are not met, the lease will be considered to be a capital lease or a lease-purchase, as appropriate. Multi-year service contracts (e.g., grounds maintenance) and multi-year purchase contracts for expendable commodities (e.g., aspirin) will be considered to be operating leases. Agencies should consult with OMB in cases where a service contract requires a private contractor to construct or acquire a capital asset solely or primarily to provide the service to the Government.

- ownership remains with the lease holder,
- the lease does not contain a bargain-price purchase option,
- present value of minimum payments over the life of the lease does not exceed 90 percent of fair market value (based on the private-sector total estimated cost of project development),
- it is a general purpose asset,
- a private-sector market exists for the asset, and
- the lease term does not exceed 75 percent of estimated economic life of the asset.

Property taxes—Property Taxes along with other operating expenses will be excluded from the lease payments for purposes of comparing present value of the minimum lease payments with the fair market value of the asset. (Note: Property taxes will be included in the calculation of net present value of the lease payments for purposes of scoring budget authority under the BEA)

REFERENCES

OMB Circular A-94, *Guidelines and Discount Rates for Benefit Cost Analysis of Federal Programs*, which defines:

- Use of Treasury rates for marketable debt instruments of similar maturity to the term of lease and
- cost-benefit analysis.

OMB Circular A-11, Appendix B, “Budgetary Treatment of Lease-Purchases and Leases of Capital Assets” where operating lease is defined.